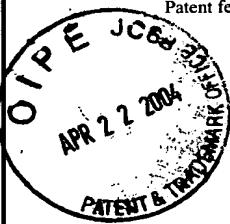


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# FEE TRANSMITTAL for FY 2004

Patent fees are subject to annual revision.

**Traffic**  
**TOTAL AMOUNT OF PAYMENT (\$)** **330.00**

Complete if Known	
Application Number	09/939,237
Confirmation Number	3412
Filing Date	August 24, 2001
First Named Inventor	Raul Nunes, et al.
Examiner Name	Helen F. Pratt
Art Unit	1761
<b>TOTAL AMOUNT OF PAYMENT (\$)</b>	<b>330.00</b>
Attorney Docket No.	8270

**METHOD OF PAYMENT**

1. [X] The Director is hereby authorized to charge indicated fees submitted on this form, credit any over payments, and charge any additional fee(s) during the pendency of this application to:

Deposit Account Number: **16-2480**Deposit Account Name: **The Procter & Gamble Company****FEE CALCULATION****1. BASIC FILING FEE – Large Entity**

Code	(\$)	Fee Description	Fee Paid
1001	770	Utility filing fee	<input type="checkbox"/>
1002	340	Design filing fee	<input type="checkbox"/>
1004	770	Reissue filing fee	<input type="checkbox"/>
1005	160	Provisional filing fee	<input type="checkbox"/>

**SUBTOTAL (1)** **(\$)** **||****2. EXTRA CLAIM FEES FOR UTILITY AND REISSUE – Large Entity**

	Extra Claims	Fee from Below	Fee Paid
Total Claims	<input type="checkbox"/> - 20** =	<input type="checkbox"/> x <input type="checkbox"/> = <input type="checkbox"/>	
Independent Claims	<input type="checkbox"/> - 3** =	<input type="checkbox"/> x <input type="checkbox"/> = <input type="checkbox"/>	
Multiple Dependent		<input type="checkbox"/> = <input type="checkbox"/>	

\*\* or number previously paid, if greater; For Reissues, see below

Code	(\$)	Fee Description
1202	18	Claims in excess of 20
1201	86	Independent claims in excess of 3
1203	290	Multiple dependent claim, if not paid
1204	86	**Reissue independent claims over original patent
1205	18	**Reissue claims in excess of 20 & over original patent

**SUBTOTAL (2)** **(\$)** **||****3. ADDITIONAL FEES**

Code	(\$)	Fee Description	Fee Paid
1051	130	Surcharge-late filing fee or oath	<input type="checkbox"/>
1052	50	Surcharge-late provisional filing fee or cover sheet	<input type="checkbox"/>
1053	130	Non-English specification	<input type="checkbox"/>
1812	2,520	For filing a request for <i>ex parte</i> reexamination	<input type="checkbox"/>
1804	920*	Requesting publication of SIR prior to Examiner's action	<input type="checkbox"/>
1805	1,840*	Requesting publication of SIR after Examiner's action	<input type="checkbox"/>
1251	110	Extension for reply within 1 <sup>st</sup> month	<input type="checkbox"/>
1252	420	Extension for reply within 2 <sup>nd</sup> month	<input type="checkbox"/>
1253	950	Extension for reply within 3 <sup>rd</sup> month	<input type="checkbox"/>
1254	1,480	Extension for reply within 4 <sup>th</sup> month	<input type="checkbox"/>
1255	2,010	Extension for reply within 5 <sup>th</sup> month	<input type="checkbox"/>
1401	330	Notice of Appeal	<input type="checkbox"/>
1402	330	Filing a brief in support of an appeal	<input checked="" type="checkbox"/>
1403	290	Request for oral hearing	<input type="checkbox"/>
1451	1,510	Petition to institute a public use proceeding	<input type="checkbox"/>
1452	110	Petition to revive - unavoidable	<input type="checkbox"/>
1453	1,330	Petition to revive - unintentional	<input type="checkbox"/>
1501	1,330	Utility issue fee (or reissue)	<input type="checkbox"/>
1502	480	Design issue fee	<input type="checkbox"/>
1460	130	Petitions to the Commissioner	<input type="checkbox"/>
1807	50	Processing fee under 37 C.F.R. 1.17(q)	<input type="checkbox"/>
1806	180	Submission of Information Disclosure Statement	<input type="checkbox"/>
1809	770	Filing a submission after final rejection (37 CFR § 1.129(a))	<input type="checkbox"/>
1810	770	For each additional invention to be examined (37 CFR § 1.129(b))	<input type="checkbox"/>
1801	770	Request for Continued Examination (RCE)	<input type="checkbox"/>
1802	900	Request for expedited examination of a design application	<input type="checkbox"/>
1454	1330	Acceptance of unintentionally delayed claim for priority under 35 U.S.C. 119, 120, 121, or 365 (a) or (c)	<input type="checkbox"/>

Other fee (specify) \_\_\_\_\_

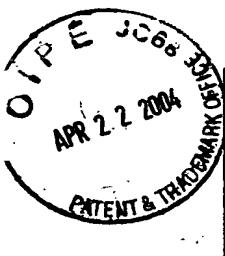
Other fee (specify) \_\_\_\_\_

\* Reduced by Basic Filing Fee Paid

**SUBTOTAL(3)** **(\$)** **||** **330**

SUBMITTED BY		Complete (if applicable)		
Name (Print/Type)	Bryn M. Taylor	Registration No. (Attorney/Agent)	P55668	Telephone (513) 634-2084
Signature	<i>Bryn M. Taylor</i>			Date 04/19/2004

+ This collection of information is required by 37 CFR 1.17. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon individual case. Any comments on the amount of time you are required to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P. O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.



I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450 on April 19, 2004.	
Bryan M. Taylor	55,668
Name of Attorney	Registration No.
Signature of Attorney	

P&G Case 8270

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of :  
RAUL NUNES et al. : Confirmation No. 3412  
Serial No. 09/939,237 : Group Art Unit 1761  
Filed: August 24, 2001 : Examiner Helen H. Pratt

For BEVERAGE COMPOSITIONS COMPRISING ARABINOGLACTAN AND DEFINED VITAMINS

BRIEF ON APPEAL

Mail Stop Appeal Brief – Patents  
Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

Enclosed, pursuant to 37 C.F.R. 1.192(a), is Appellant's brief on Appeal for the above application. The Brief is being forwarded in triplicate.

The fee for this Brief on Appeal is \$330.00 37 CFR 1.17(c).

The Director is hereby authorized to charge the above fee, or any additional fees that may be required, or credit any overpayment to Deposit Account No. 16-2480 in the name of The Procter & Gamble Company. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

By   
Bryan M. Taylor  
Attorney or Agent for Applicant(s)  
Registration No. 55,668  
(513) 634-2084

Date: April 19, 2004

Customer No. 27752

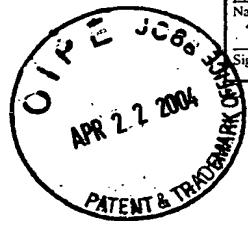
04/23/2004 MAHMED1 00000026 162480 09939237

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330.00 DA

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450 on April 19, 2004.

Brynn M. Taylor	55,668
Name of Attorney	Registration No.
<i>Brynn M. Taylor</i>	
Signature of Attorney	



P&G Case 8270

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of :  
**RAUL NUNES et al.** : Confirmation No. 3412  
 Serial No. 09/939,237 : Group Art Unit 1761  
 Filed: August 24, 2001 : Examiner Helen H. Pratt

For BEVERAGE COMPOSITIONS COMPRISING ARABINOGLACTAN AND DEFINED VITAMINS

APPELLANT'S BRIEF

Mail Stop Appeal Brief - Patents  
 Commissioner for Patents  
 P. O. Box 1450  
 Alexandria, VA 22313-1450

Dear Sir,

Applicants hereby appeal to the Board of Appeals the decision of the Examiner dated November 18, 2003, finally rejecting Claims 17-28. This Appellant's Brief is being filed in triplicate.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio, assignee of Appellants' entire right, title and interest in the invention at issue. A copy of this Assignment was recorded at the United States Patent and Trademark Office on August 2, 2002, at reel # 012970, frame # 0434.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to the Appellant, or known to Appellant's legal representative, that will directly affect the Board's decision in the present appeal.

STATUS OF CLAIMS

The application was originally filed with claims 1-27. In an amendment filed on October 2, 2003 Claims 1-16 were cancelled, Claim 17 was amended and Claim 28 was added. Claims 17-28 were finally rejected in an Office Action dated November 18, 2003.

A Notice of Appeal for Claims 17-28 was mailed on February 11, 2004. A complete copy of the appealed claims is set forth in the Appendix.

STATUS OF AMENDMENTS

A response to the first Office Action was filed October 2, 2003. In that response, Claims 1-16 were cancelled, Claim 17 was amended and Claim 28 was added. Claims 17-28 were finally rejected in an Office Action dated November 18, 2003. No amendments were submitted after final rejection.

SUMMARY OF INVENTION

The present invention is directed to beverage compositions containing supplemental vitamins. Vitamin supplementation is common in the field of beverage compositions. However, vitamin solubility can be a serious problem when formulating beverage compositions with fat-soluble vitamins, such as vitamins A, D and E. The inclusion of fat-soluble vitamins often results in such formulations being unacceptable due to insolubility and, ultimately, instability of the desired vitamin supplement. In such beverage compositions, the vitamin may eventually settle to the bottom of the container that holds the composition, such that, when consumed, this resulting high concentration of vitamins may impart a bad flavor and unpleasant appearance to the composition.

It is therefore important to develop methods in which fat-soluble vitamins may be solubilized or stabilized in beverage compositions. Various methods have been attempted and are commonly used, such as, for example, emulsification. However, emulsifiers typically utilized do not provide any nutritive benefit and serve only to support of the vitamin in the beverage composition. Additionally, emulsifiers add cost and calories to beverage compositions, both of which are undesirable.

The present inventors have quite surprisingly discovered that the foregoing problems of vitamin stability are overcome in beverage compositions comprising a fiber known as arabinogalactan. Arabinogalactan fiber is useful for providing a dietary fiber benefit to the consumer, as well as additional benefits in the field of immune function. It is therefore quite exciting that this fiber may be used, not only to provide these benefits, but also to stabilize the defined fat-soluble vitamins as well. While use of a fiber in this context would ordinarily result in increased viscosity and likely unacceptability of the final beverage product, it has further been found that the arabinogalactan fiber is not precluded from use due to any problems associated with viscosity. In fact, the beverage compositions of the present invention provide excellent viscosity, which is acceptable to the consumer.

## ISSUES

Are Claims 17 and 18 unpatentable under 35 U.S.C. § 102(b) for being anticipated by McAnalley?

Are Claims 17-28 unpatentable under 35 U.S.C. § 103(a) for being obvious over Celestial Seasonings Echinacea Complete Care, or Vitaminwater, or Odwalla Introduces Glorious Morning, in view of McAnalley, and also taken alone, or in view of Fuse?

## GROUPING OF CLAIMS

Claims 17-28 are within the same patentable grouping, and, therefore, stand or fall together.

## ARGUMENTS

### *The Rejection under 35 U.S.C. § 102 (b)*

#### Examiner's Rejection

The Examiner has rejected Claims 17 and 18 under 35 U.S.C. § 102 (b) as being anticipated by McAnalley, WO 98/06418 (herein "McAnalley"). In particular, the Examiner argues that McAnalley discloses a composition as in the present Claim 17. The Examiner asserts that the McAnalley composition can be in liquid form, and is therefore considered a beverage. The Examiner also states that the McAnalley composition contains arabinogalactan and vitamins A, B, C, D and E within the ranges in Claim 18. Additionally, while the Examiner acknowledges that as amended in the October 2, 2003 response, Claim 17 of the present application requires two or more vitamins selected from Vitamin A, D and E, the Examiner argues that these vitamins are included under the heading "vitamins and minerals" found in McAnalley.

#### Appellants' Argument

Under 35 U.S.C. § 102, a claim is anticipated only if each and every claim element is found, either expressly or inherently disclosed, in a single prior art reference. See *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). Although this disclosure requirement presupposes the knowledge of one skilled in the art of the claimed invention, that presumed knowledge does not grant a license to read into the prior art reference teachings that are not there. See *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 43 USPQ2d 1481, 1490 (Fed. Cir. 1997). Additionally, there must be no difference between what is

claimed and what is disclosed in the applied reference. See *Scripps v. Genetech Inc.*, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991). Moreover, it is incumbent on the Examiner to identify wherein each and every facet of the claimed invention is disclosed in the applied reference. *Ex parte Levy*, 17 USPQ2d 1461, 1462 (BPAI 1990).

As aforementioned, the Examiner has rejected Claims 17 and 18 under 35 U.S.C. as being anticipated by McAnalley. Appellants respectfully assert that McAnalley fails to teach the particular combination of arabinogalactan with two or more fat-soluble vitamins, and therefore, fails to teach *each and every* claim element of the present invention. Rather, McAnalley broadly discloses dietary supplements containing saccharides and, in one variation, vitamins and minerals. See McAnalley pg.13. There is no requirement in McAnalley that two or more fat-soluble vitamins selected from vitamin A, D and E, be present in the invention disclosed therein. In contrast, the present invention specifically requires the combination of arabinogalactan and *two or more* fat-soluble vitamins selected from Vitamins A, D and E, in order to achieve the previously discussed benefits. Because McAnalley fails to teach this specific combination as required to do under 35 U.S.C. § 102, Appellants respectfully assert that McAnalley fails to anticipate the present invention.

Additionally, Appellants respectfully assert that McAnalley fails to teach beverage compositions, as claimed in the present application. McAnalley refers generally to “liquids” as one of many possible variants for the compositions disclosed therein. See McAnalley pg. 14. Appellants respectfully assert that this laundry list of compositions, which happens to include liquids, does not amount to anticipation. McAnalley fails to provide any specific limitation regarding what the “liquid” is, or how much water is present. In contrast, Appellants clearly define beverage compositions to mean that at least 4% of the composition is water, and most preferably, at least about 80% of the composition is water. See Specification pg. 25. As there is no similar indication in McAnalley, Appellants respectfully assert that for this additional reason, McAnalley fails to anticipate the present invention.

Moreover, Appellants respectfully assert that McAnalley fails to meet the requirement that there be no difference between what is claimed and what is disclosed in the applied reference. As aforementioned, the present inventors have surprisingly discovered that the combination of arabinogalactan and two or more fat-soluble vitamins selected from Vitamins A, D and E provides increased solubility and stability of the beverage compositions. In contrast, the dietary supplements of McAnalley require the inclusion of water-soluble vitamins and minerals. See McAnalley, Claim 17. Appellants respectfully assert that this requirement of water-soluble vitamins and minerals presents a substantial difference from the present invention. Moreover,

unlike the present invention, McAnalley fails to teach beverage compositions having a defined and claimed water content. Because McAnalley teaches a substantially different formulation than disclosed herein, Appellants respectfully assert that McAnalley fails to anticipate the present invention.

Thus, because McAnalley fails to teach each and every element of the invention disclosed herein, and because McAnalley requires a substantially different formulation than presently taught, Appellants respectfully assert that McAnalley fails to anticipate the present invention under 35 U.S.C. § 102. Thus, Appellants respectfully request the rejection of Claims 17 and 18 be withdrawn.

*The Rejection under 35 U.S.C. § 103(a)*

The Examiner has rejected Claims 17-28 under 35 U.S.C. § 103 as being unpatentable over Celestial Seasonings Echinacea Complete Care (herein “CS”), or Glaceau, or Odwalla Introduces Glorious Morning (herein “Odwalla”), in view of McAnalley, or taken alone, and also in view of Fuse, JP 2-154,673 (herein “Fuse”). For the following reasons, Appellants respectfully traverse this rejection.

The Rejection and Cited Art

The CS reference consists of a photocopy of a box used to package the supplement product. CS generally discloses capsule herbal supplements containing vitamin C, zinc, Echinacea and arabinogalactan.

The Glaceau reference is simply a label removed from a beverage composition. Glaceau indicates the ingredients in the composition, which may include water, fructose, flavor, vitamin C, electrolytes, arabinogalactan, Echinacea and zinc picolinate.

The Odwalla reference is an Internet publication, originally submitted for consideration by Appellants, that discusses a beverage composition. Odwalla generally teaches some of the ingredients in the composition, including orange juice, magnesium, calcium, arabinogalactan and vitamin D. However, Appellants assert that the Odwalla reference is not prior art under 35 U.S.C. § 102 and, therefore, is not a proper basis of rejection under 35 U.S.C. § 103. Specifically, the Odwalla reference was located on the Internet by Appellants on September 6, 2001. Appellants have no reason to believe this reference was available prior to that date. The present application was filed on August 4, 2001, and makes a proper claim of priority to a provisional application filed on September 29, 2000. Therefore, because the present application has an effective filing date prior to the publication of the Odwalla reference on the Internet, Appellants respectfully

assert the Odwalla reference is an improper basis for rejection under 35 U.S.C. § 103, and because of this, the reference will not be discussed further.

McAnalley generally discloses the use of plant carbohydrates for dietary supplements and nutritional support for promotion and maintenance of good health. Such supplements may include phytonutrients, vitamins, minerals, herbal extracts and other non-toxic nutrients. Additionally, these supplements are preferably administered orally, in the form of a capsule or tablet, or topically, in the form of a lotion or cream.

Finally, Fuse generally discloses a method for manufacturing a drink containing arabinogalactan. The Fuse compositions may also contain additional ingredients, such as sugar and water-soluble vitamins.

The Examiner has rejected Claims 17-28 over CS, Glaceau or Odwalla, either alone or in combination with McAnalley, and further in view of Fuse. Specifically, the Examiner cites CS as disclosing a composition containing arabinogalactan and vitamin C. While the Examiner admits that CS teaches capsules rather than beverage compositions, the Examiner argues that “a beverage is no more than a drinkable liquid,” and states that there is no water even seen in the Appellants’ invention. The Examiner continues by restating the rejection made under §102 above, and concludes that it would have been obvious to make the beverage compositions claimed herein by using the ingredients of McAnalley in liquid form.

Next, the Examiner again cites McAnalley, this time for the teaching of a dry beverage composition containing arabinogalactan from the Larch tree, and states that, although McAnalley fails to teach the particular amount of arabinogalactan disclosed herein, it would have been obvious to one of ordinary skill to vary the arabinogalactan content based on desired viscosity. Thus, the Examiner concludes it would have been obvious to use the disclosed ingredients to make a dry beverage composition.

Moreover, the Examiner argues that, while the present invention specifically requires two or more fat-soluble vitamins, the fact that McAnalley generally teaches ‘vitamins’ certainly covers the fat-soluble vitamins of the present invention.

The Examiner also states that there is nothing new about the vitamins, or amounts thereof, disclosed in the claims of the present invention and that it would have been obvious to one of ordinary skill in the art to use such vitamins at such levels as disclosed herein. More particularly, the Examiner states that there is nothing new or unobvious about the further requirement that the two fat soluble vitamins be Vitamins A and E, as in the present Claim 28.

Finally, the Examiner concludes by stating that Appellants' specification allows for compositions containing from 0% to 99.999% water, and thus, the formulation of such compositions into capsules has not been excluded.

### The Argument

The Examiner bears the burden of factually supporting any *prima facie* conclusion of obviousness. In determining the differences between the cited art and the claims, the question is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. *See Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530 (Fe. Cir. 1983). Distilling the invention down to the "gist" or "thrust" of an invention disregards the requirement of analyzing the subject matter "as a whole." *See W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir. 1983). If, viewing the invention as a whole, the Examiner does not produce a *prima facie* case, the Applicant is under no obligation to submit evidence of non-obviousness. *See In re Fritch*, 972 F.2d 1260 (Fed. Cir. 1992). Inventors of unobvious compositions, such as those of the present invention, enjoy a *presumption* of non-obviousness, which must then be overcome by the Examiner establishing a case of *prima facie* obviousness by the appropriate standard. If the Examiner does not prove a *prima facie* case of unpatentability, then without more, the Applicants are entitled to grant of the patent. *See In re Oetiker*, 977 F.2d 1443.

As aforementioned, the Examiner has not satisfied the burden of establishing a *prima facie* case of obviousness. To establish a *prima facie* case of obviousness under 35 U.S.C. §103, the Examiner must meet three basic criteria. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest *all* the claim limitations. *See*, for example, *In re Vaeck*, 947 F.2d 488 (Fed. Cir. 1991). Appellants respectfully assert that the Examiner fails to establish any of the foregoing criteria, and thus, fails to establish a *prima facie* case of obviousness.

First, Appellants respectfully assert that there is no suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the individual references or combine reference teachings. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *See In re Mills*, 916 F.2d 680 (Fed. Cir.

1990). Appellants respectfully assert that the Examiner's presumptions that "a beverage is no more than a drinkable liquid," and thus "it would have been obvious to make a composition containing the claimed arabinogalactan and vitamins in the claimed amounts," does not satisfy the requirements for establishing the first criteria of a *prima facie* case of obviousness.

Appellants respectfully assert that the cited references, either alone or in combination, do not teach or suggest the beverage compositions of the present invention, which may be either a 'dry' concentrate, that is diluted with water before consumption, or a ready-to-drink beverage. See Claims 17 and 21 respectively. Neither CS, nor Glaceau, either alone or in view of McAnalley, or Fuse, teaches or suggests the beverage compositions of the present invention. Moreover, there would be no motivation to combine CS, or arguably McAnalley, with Fuse or Glaceau since CS and McAnalley generally teach capsules, while the other references generally disclose liquid compositions. Appellants respectfully assert that simply putting a supplement, in capsule or tablet form, into a liquid does not make a beverage as defined presently, as the compositions of CS and McAnalley are not designed to be used in this manner to make a beverage composition. Thus, there is no motivation in CS and McAnalley to make the present stable beverage compositions. Furthermore, of those references disclosing liquid compositions, namely Glaceau and Fuse, there is no teaching or suggestion of a beverage composition requiring arabinogalactan and two or more fat-soluble vitamins selected from vitamins A, D and E. Indeed, Appellants respectfully assert that the Examiner has in fact used the Appellants' own disclosure to find the requisite motivation needed to declare such beverage compositions obvious. As this is an improper source for obviousness determination purposes, Appellants respectfully assert that the first requirement for establishing a *prima facie* case of obviousness has not been satisfied.

Second, Appellants respectfully assert that the cited references fail to provide a reasonable expectation of success. The Examiner states that although the cited art may not teach the exact amounts of arabinogalactan and vitamins disclosed presently, it would be obvious to modify those amounts to satisfy viscosity requirements. Appellants respectfully disagree. The present formulation was purposefully developed to not only provide a good source of fiber and vitamins, but also to provide a pleasant-tasting drinkable beverage that would appeal to consumers. In order to accomplish this, the present composition, was formulated to overcome the difficulties often associated with such beverages, namely sedimentation and the formation of off-flavors. The cited art fails to address either of these obstacles or ways by which to overcome them. Therefore, Appellants respectfully assert that merely modifying the amount of arabinogalactan and vitamins in the compositions of the cited art for viscosity purposes, as the Examiner suggests, would not necessarily provide a pleasant-tasting, enjoyable, beverage

experience, as does the present composition. Thus, Appellants respectfully assert that the cited art fails to provide the requisite reasonable expectation of success.

Furthermore, Appellants respectfully assert that none of the cited references, either alone or in combination, teach or suggest *all* the claim limitations. The present invention is directed specifically to beverage compositions comprising arabinogalactan and two or more fat-soluble vitamins, namely vitamins A, D and E. None of the cited art, either individually or in combination, teaches this specific formulation.

CS may generally disclose arabinogalactan and vitamin C, but it is a capsule, not a beverage. Moreover, CS teaches only water-soluble vitamins rather than fat-soluble vitamins. Appellants respectfully assert that there is nothing in the remaining cited references that corrects these deficiencies in CS.

Furthermore, the primary of focus of McAnalley is capsules. McAnalley does refer generally to "liquids" as one of many possible variants for the compositions disclosed therein. See McAnalley pg. 14. However, Appellants respectfully assert that this laundry list of compositions, which happens to include liquids, does not amount to teaching or suggesting the beverage compositions of the present invention.

Additionally, while Glaceau and Fuse may generally disclose liquid or beverage compositions containing arabinogalactan, none specifically limit the vitamins suitable for use therein to fat-soluble vitamins, and specifically to vitamins A, D and E. As discussed previously, fat-soluble vitamins present unique solubility and stability issues in beverages, and thus, the inclusion of water-soluble vitamins cannot be said to make the inclusion of fat-soluble vitamins obvious.

Moreover, as stated above, the Examiner states that although the cited art may not teach the exact amounts of arabinogalactan and vitamins disclosed presently, it would be obvious to modify those amounts to satisfy viscosity requirements. Appellants respectfully assert that the amount of arabinogalactan and vitamins included in the cited art compositions is irrelevant to the present discussion because the cited art does not even teach the same ingredients as the present invention. In particular, the Examiner states there is nothing new about the use of vitamins A and E. Appellants respectfully assert that the combination of vitamins A and E with an arabinogalactan beverage composition is indeed new and unobvious over the cited art, none of which teach or suggest this particular combination of ingredients.

Finally, the Examiner states that the present compositions may contain from 0% to 99.999% water, and therefore, may include capsules like those in CS and McAnalley. Appellants respectfully assert that this is incorrect. The present specification defines "beverage composition" as containing at least about 4%, and most preferably at least about 80% water. Only "dry

beverage compositions" made according to the present formula may contain from about 0% to about 4% water.

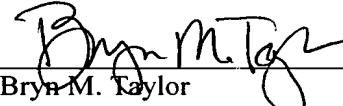
Therefore, because the cited references fail to teach all the limitations of the present claims, Appellants respectfully assert that the third criteria for establishing a prima facie case of obviousness has not been satisfied.

Thus, because the cited references, either alone or in combination, fail to provide the motivation to modify or combine the references, and fail to provide a teaching of all limitations of the present claims, Appellants respectfully assert that a prima facie case of obviousness had not been established. Therefore, it is respectfully requested that the obviousness rejection under 35 U.S.C. § 103 be withdrawn.

SUMMARY

In view of all of the above, it is respectfully submitted that the Examiner's rejection of Claims 17-28 under 35 U.S.C. §§ 102 and 103 are improper. Reversal of such rejection is therefore respectfully requested.

Respectfully submitted,

By   
Bryn M. Taylor  
Attorney or Agent for Appellants  
Registration No. 55,668  
Tele. No. (513) 634-2084

Date: April 19, 2004

Customer No. 27752

**APPENDIX**

17. A beverage composition comprising:
  - a) a first component which is arabinogalactan; and
  - b) a second component comprising two or more vitamins selected from the group consisting of vitamin A, vitamin D, and vitamin E.
18. A beverage composition according to Claim 17 which comprises from about 0.001% to about 50% arabinogalactan, by weight of the composition.
19. A beverage composition according to Claim 18 which comprises from about 0.001% to about 15% arabinogalactan, by weight of the composition.
20. A beverage composition according to Claim 19 wherein the arabinogalactan is naturally occurring within a tree source of the genus *Larix*.
21. A beverage composition according to Claim 20 which is a dry beverage composition.
22. A beverage composition according to Claim 21 comprising:
  - (a) from 0% to about 1% of vitamin A, by weight of the composition;
  - (b) from 0% to about 0.5% of vitamin D, by weight of the composition; and
  - (c) from 0% to about 2% of vitamin E, by weight of the composition.
23. A beverage composition according to Claim 20 which is a ready-to-drink beverage composition comprising at least about 50% water.
24. A beverage composition according to Claim 22 comprising:
  - (a) from 0% to about 1% of vitamin A, by weight of the composition;
  - (b) from 0% to about 0.5% of vitamin D, by weight of the composition; and
  - (c) from 0% to about 2% of vitamin E, by weight of the composition.
25. A beverage composition according to Claim 24 wherein:
  - (a) when the composition comprises vitamin A, the composition comprises from about 0.0002% to about 0.5% of vitamin A, by weight of the composition;

- (b) when the composition comprises vitamin D, the composition comprises from about 0.00002% to about 0.5% of vitamin D, by weight of the composition; and
- (c) when the composition comprises vitamin E, the composition comprises from about 0.0002% to about 1% of vitamin E, by weight of the composition.

26. A beverage composition according to Claim 25 which has a pH of from about 2.5 to about 7.

27. A beverage composition according to Claim 26 wherein the vitamin A is *beta*-carotene and the vitamin E is vitamin E acetate.

28. A beverage composition according to Claim 27 comprising vitamin A and vitamin E.